92-1780

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EDWARD A. GEICK,

Petitioner,

VS.

JAMES W. KAY, President of the Board of Trustees of the Village of Lake Zurich, Illinois, and Individually, and the BOARD OF TRUSTEES OF THE VILLAGE OF LAKE ZURICH, ILLINOIS,

Respondents.

Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an employer have first amendment protection rights to assert an absolute privilege to employee tort actions for libel *per se*, libel *per quod*, invasion of privacy, and intentional interference with prospective economic advantage if such tort actions are based upon employer's breach of an executed separation agreement barring any commentary about the employee's past employment with employer?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests this Court to issue a writ of certiorari to the Appellate Court of Illinois, Second Judicial District, to review that Court's decision and opinion entered on November 5, 1992 (App. A), with a subsequent denial of a petition for leave to appeal with the Supreme Court of the State of Illinois on February 3, 1993 (App. B).

OPINIONS BELOW

On November 5, 1992, the Appellate Court of Illinois, Second Judicial District, affirmed the judgment of the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, that the petitioner's causes of action for libel *per se*, libel *per quod*, invasion of privacy, and intentional interference with prospective economic advantage were barred by absolute privilege irrespective of the existence of a separation agreement barring the commentary about the petitioner's employment with the respondents (App. C).

On February 3, 1993, the Illinois Supreme Court denied petitioner's petition for leave to appeal.

JURISDICTION

1. The decision of the Appellate Court of Illinois, Second Judicial District, was entered on November 5, 1992.

2. The petition for leave to appeal to the Supreme Court of Illinois was denied on February 3, 1993.

3. The federal question of the petitioner's violation of his first amendment rights was raised in his complaint wherein the petitioner argued that the separation agreement (App. C), contractually barred the application of the absolute privilege on the legal theory that the separation agreement was a contract barring any commentary by the respondents about the petitioner's employment with the respondents.

4. The petition for writ of certiorari was filed less than ninety (90) days from the denial of the petition for leave to appeal by the Supreme Court of Illinois on February 3, 1993.

5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

Prior to January 31, 1990, the petitioner served in the position of Village Administrator for the Village of Lake Zurich, Lake County, Illinois.

Prior to January 31, 1990, differences arose among the petitioner, the respondent, President of the Board of Trustees of the Village of Lake Zurich, and certain members of the Board of Trustees of the Village of Lake Zurich, Illinois.

It was agreed among the petitioner, the respondent, James W. Kay, President of the Board of Trustees of the

Village of Lake Zurich, and the Board of Trustees of the Village of Lake Zurich, that the petitioner would resign on the 31st day of January, 1990, in conjunction with a Separation Agreement executed by the parties (App. D).

Among the provisions of the Separation Agreement executed by and between the parties on January 31, 1990, specifically paragraph 4 provided as follows:

> 4. Neither Geick nor the Village shall make any statements or comments to members of the public or the media, including any newspapers, regarding Geick's resignation from his position as Village Administrator; Geick's alleged involvement in Case No. 89 C 7911 presently pending in the United States District Court for the Northern District of Illinois; or Geick's previous employment as the Village Administrator in Theinsville, Wisconsin.

In addition to paragraph 4 of the Separation Agreement, paragraph 6 also provided:

> 6. The Village agrees that neither the Village President nor any member of the Board of Trustees shall give a reference that is negative to or critical of Geick's tenure as Village Administrator to any municipality, public entity or prospective employer that inquires into Geick's position as Village Administrator. The Village further agrees that if asked by a prospective employer for a reference, the inquiring party shall be told that it is the policy of this Village Board with regard to this position, to make no reference or recommendation, either negative or positive, and that the party should feel free to contact the former Village President should they care to make any further inquiry.

Subsequent to the Separation Agreement between the parties, on February 3, 1990, in the *Daily Herald*, the respondent, James W. Kay, was quoted as stating:

> "I think a key element in finding a village administrator is the word trust," Kay said. "I say that word because that's how I feel. It's very, very important. I'll look at personality even before I look at credentials."
>
> "It's been a difficult job for me to inherit the mess this town is in," Kay added. "You must feel that you can trust your staff in a situation like this and turn to them for guidance."

On February 8, 1990, in the *Lake Zurich Courier*, the respondent, James W. Kay, asserted:

> "The key factor with a village administrator is trust. I will be trusting him with the day to day running of the village," Kay said. In addition to meeting the position requirements, Kay said personality and how the candidate responds to the people of Lake Zurich are very important. Because of this, the interviewing process will be extensive, he said.
>
> "I will make it clear to (village administrator candidates) I'm an active mayor," Kay said.

On February 9, 1990, in the *Lake Zurich Enterprise*, the respondent stated:

> "I spoke with several mayors of other communities and asked them what they expected from their administrators. And the one word that kept popping up was trust," Kay said. "You have to have people in their (sic) that you can trust."

On February 13, 1990, in a *Chicago Sun-Times* article, the respondent stated that the petitioner had resigned and that there had been a settlement agreement executed relative to a harassment suit filed by a woman, according to the respondent.

On December 17, 1989, International City Management Association Newsletter advertised for an executive director for Storm Water Agency of Lake County, Illinois.

In conjunction with the advertisement appearing in the International City Management Association Newsletter, the petitioner filed an application on April 17, 1990.

After filing the application for a position of executive director of the Storm Water Agency of Lake County, Illinois, the petitioner had a reasonable expectation of entering a valid relationship based upon the following facts:

A. On July 19, 1990, the petitioner was interviewed by a Lake County Storm Water Selection Committee consisting of Richard Welton, Mayor of Gurnee, Illinois, Robert Chafe, Chairman of the Storm Water Agency Board, and Director of the Planning and Zoning of Lake County, Illinois, William Barren, Assistant County Administrator of Lake County, Illinois, and Eleanor Roston;

B. On July 24, 1990, Robert Chafe offered the position to the petitioner;

C. On July 27, 1990, the petitioner accepted the position;

D. On July 30, 1990, based upon the offer and acceptance of the position of Director of the Storm Water Agency for Lake County, Illinois, the petitioner informed the City of Elkhorn, Wisconsin, that he would be resigning as Administrator of that City;

E. On August 15, 1990, the petitioner appeared at the Lake County Storm Water Management Planning Commission for ratification of his contract;

F. On August 15, 1990, at the meeting before the Storm Management Planning Commission the contract between the petitioner and the Commission was postponed until there could be an independent investigation of the petitioner's background.

The independent investigation was instigated by certain remarks that the respondent made to a newspaper reporter, Maribeth Vander Weele, of the Lake Zurich *Daily*

Herald, August 2, 1990, relating to certain comments that the respondent had made to the *Daily Herald* on February 3, 1990, on February 8, 1990 in the *Lake Zurich Courier*, and on February 9, 1990 in the *Lake Zurich Enterprise*, relating to the petitioner's trustworthiness and competency, and February 13, 1990, in the *Chicago Sun-Times*, stating that the petitioner had been involved in a sexual harassment suit.

Thereafter, the newspaper reporter, Maribeth Vander Weele, contacted the petitioner who termed those remarks as "politics".

On August 3, 1990, Village President James W. Kay was quoted in the *Daily Herald*, as follows:

> Village President James Kay, who asked for Geick's resignation, called the suggestion of politics "offensive," but declined to elaborate because of the legal agreement. "There was a serious sexual harassment charge," Kay added. "There were a lot of factors that played into it."

In response to the petitioner's statement, the respondents published a press release bearing the letterhead of the Village of Lake Zurich, which appeared in the newspapers, and specifically in the *Daily Herald* on August 8, 1990, denouncing the petitioner for describing the respondent Kay's, commentaries in the newspapers as politics.

On August 23, 1990, in the *Lake Zurich Courier*, the respondent was quoted as stating that there was a settlement between a female employee and the Village and Geick concerning sexual harassment.

On August 24, 1990, in the *Lake Zurich Enterprise*, the respondent is quoted as follows:

> In a phone interview later, Kay said that, as a resident of Lake County, he "would not be happy if

> Geick were to get the job." He also said that if he were on the committee himself he would vote against Geick's appointment. "I would vote 'no', no question, no hesitancy."
>
> "I don't think it's fair that they're only hearing his side, and I feel backed up against the wall," Kay said of the agreement not to speak of Geick's previous employment record. "If I had known it would come to this, I wouldn't have signed (the silence agreement.) I would have just fired him. There was that option." A gag order has been instituted which restrains all parties from discussing Geick's resignation.

On June 10, 1991, the Court entered an order dismissing the petitioner's complaint relating to libel *per se*, libel *per quod*, and invasion of right of privacy by publication of a private fact, with prejudice, via a 2-619 motion with the petitioner being allowed to amend his complaint relating to intentional interference with prospective economic advantage, and adding a count for breach of contract.

On September 18, 1991, the Court entered an order dismissing with prejudice petitioner's amended count relating to intentional interference with prospective economic advantage, on the grounds of a 2-619 motion, but denied the respondents' motion to dismiss petitioner's breach of contract, requiring the respondents to file an answer within 21 days.

On November 13, 1991, the petitioner voluntarily dismissed his breach of contract count of his first amended complaint so as to finalize the causes of action for purposes of appeal to the Appellate Court.

On November 5, 1992, the Illinois Appellate Court, Second District, affirmed the decision of the Circuit Court of Lake County, Illinois, dismissing petitioner's complaint for libel *per se*, libel *per quod*, invasion of privacy, and

intentional interference with prospective economic advantage on the basis of absolute privilege.

On February 3, 1993, the Illinois Supreme Court denied petitioner's application for leave to appeal.

REASON FOR GRANTING THE WRIT

I.

THE SEPARATION AGREEMENT CONTRACTUALLY BARS THE APPLICATION OF THE ABSOLUTE PRIVILEGE IN MAINTAINING TORT ACTIONS.

In the Circuit and Appellate Courts, the petitioner argued that the separation agreement executed by the parties constituted a contract, and that the respondents waived their absolute privilege by agreeing to utter no commentary about the petitioner's resignation or his employment, pursuant to paragraphs 4 and 6, which were recited in Count II of the petitioner's complaint, which state:

> 4. Neither Geick nor the Village shall make any statements or comments to members of the public or the media, including any newspapers, regarding Geick's resignation from his position as Village Administrator; Geick's alleged involvement in Case No. 89 C 7911 presently pending in the United States District Court for the Northern District of Illinois; or Geick's previous employment as the Village Administrator in Theinsville, Wisconsin.
>
> 6. The Village agrees that neither the Village President nor any member of the Board of Trustees shall give a reference that is negative to or critical of Geick's tenure as Village Administrator to any

> municipality, public entity or prospective employer that inquires into Geick's position as Village Administrator. The Village further agrees that if asked by a prospective employer for a reference, the inquiring party shall be told that it is the policy of this Village Board with regard to this position, to make no reference or recommendation, either negative or positive, and that the party should feel free to contact the former Village President should they care to make any further inquiry.

The significance of paragraphs 4 and 6 of the Separation Agreement is that they are analogous to the facts relating to the protection of confidentiality as found in *Cohen v. Cowles Media Company d/b/a Minneapolis Star & Tribune Company*, 111 S.Ct. 2513 (1991).

In *Cohen*, newspaper reporters violated promises of having Cohen's name remain confidential in exchange for certain information that Cohen had provided about a certain candidate in the forthcoming election.

In its opinion, the Supreme Court of the United States ruled that the reporters' promises of confidentiality constituted a promissory estoppel, and that publication of such confidential information resulted in a breach of contract, not protected speech under the First Amendment of the United States Constitution.

Similarly, the Separation Agreement, in this matter, is analogous to reporters' promises of confidentiality, and therefore, bars publication.

In its Appellate Court opinion, pages 14 and 15, in addressing the *Cohen* decision's applicability to the petitioner, the Appellate Court contends that *Cohen* concerned a breach of a promise (promissory estoppel) rather than tort actions.

Furthermore, at page 15, the Appellate Court notes that the circuit court did not dismiss petitioner's breach of contract count, implying that the *Cohen* decision related to that count, with the result that the respondents have the affirmative defense of absolute privilege for the petitioner's tort actions.

However, in this instance, the petitioner contends that he has two causes of action for the breach of the separation agreement.

For the breach he is seeking damages that caused him to lose new employment with a lowered earning capacity, facts similar to those of *Cohen*.

For the tort actions, he is seeking damages to reputation, invasion of privacy, and intentional interference with prospective economic advantage.

These tort actions are not barred by the absolute privilege defense on the legal theory that the breaching of the separation agreement prohibiting commentary constituted a waiver of the absolute privilege defense.

Waiver of defenses and immunities against liability are recognized in tort law.

In *Holda v. County of Kane*, 88 Ill.App.3d 522 (2d Dist. 1980), at 528, the Court held that, although the Illinois Tort Immunity Act has provided to municipalities defenses and immunities against liability, such defenses and immunities are waived when municipalities purchase policies of liability insurance.

By analogy, when the respondents executed the separation agreement with the petitioner, that executed agreement by them, constituted waiving the defense of absolute privilege upon which they could not rely when they breached

the separation agreement as they had thereby entitling the petitioner to maintain tort actions for libel *per se*, libel *per quod*, invasion of privacy, and intentional interference with prospective economic advantage.

CONCLUSION

For the above stated reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the Appellate Court of Illinois
Second Judicial District
No. 2-91-1396 — Filed November 5, 1992

EDWARD A. GEICK,

Plaintiff-Appellant,

v.

JAMES W. KAY, Indiv., and as President of the Board of Trustees of The Village of Lake Zurich, and THE BOARD OF TRUSTEES OF THE VILLAGE OF LAKE ZURICH,

Defendants-Appellees.

Appeal from the Circuit Court of Lake County.
No. 90-L-1707
Honorable William D. Block, Judge Presiding.

JUSTICE NICKELS delivered the opinion of the court:

Plaintiff, Edward A. Geick, filed a four-count complaint in the circuit court of Lake County against defendants, James W. Kay, as president of the board of trustees of the Village of Lake Zurich and individually, and the board of trustees of the Village of Lake Zurich (Board). The complaint sought damages for libel *per se*, libel *per quod*, invasion of privacy, and intentional interference with prospective economic advantage. All four counts were eventually dismissed with prejudice. A later count for breach of contract was voluntarily dismissed by plaintiff, and this appeal followed. The issues involve whether plaintiff

stated a cause of action for these counts and/or whether any defenses bar recovery.

Count I of the complaint based on libel *per se* alleged that plaintiff served as village administrator for the Village of Lake Zurich (Lake Zurich). Due to differences arising between plaintiff and defendants, the parties agreed that plaintiff would resign on January 31, 1990, in conjunction with a "separation agreement" (separation agreement). The separation agreement provided that neither plaintiff or Lake Zurich would make any statements to the public or media regarding plaintiff's resignation, plaintiff's alleged involvement in a Federal court case, or plaintiff's previous employment as an administrator in Wisconsin. It was alleged that the separation agreement required that neither the Board president nor members would provide a negative or critical reference for plaintiff and that any prospective employer would be told that as a matter of policy no recommendation or reference, positive or negative, would be given.

It was alleged that defendant Kay implied plaintiff was not trustworthy when Kay made certain statements quoted in the *Daily Herald* newspaper on February 3, 1990. Kay stated:

> "I think a key element in finding a village administrator is the word trust. * * * I say that word because that's how I feel. It's very, very important. I'll look at personality even before I look at credentials. It's been a difficult job for me to inherit the mess this town is in. * * * You must feel that you can trust your staff in a situation like this and turn to them for guidance."

It was alleged that Kay made similar remarks regarding the need for trust in an administrator on February 8 and 9, 1990, to two other newspapers.

The complaint further alleged that in an article in the Chicago Sun-Times newspaper on February 13, 1990, Kay stated that plaintiff resigned. Kay said that a settlement agreement had been executed in a harassment suit filed by a woman. It was plaintiff's position that all the remarks alleged in the complaint violated the separation agreement.

Plaintiff alleged that pursuant to his April 17, 1990, application for a position as director of the Lake County storm water management committee, he interviewed for the job in July 1990. Plaintiff claimed that certain allegations relating to Kay's statements resurfaced. Plaintiff was required to respond to the allegations as being "politically motivated." On August 3, 1990, Kay told a newspaper that the suggestion of politics was "offensive" but declined to elaborate because of the separation agreement. He said, "There was a serious sexual harassment charge. There were a lot of factors that played into it."

It was alleged that Kay issued a press release on August 8, 1990, on Lake Zurich letterhead paper to a newspaper which implied that plaintiff was a liar. The press release addressed the resignation of plaintiff, the suggestion of "politics" in Lake Zurich's decision-making process, the sexual harassment lawsuit and its settlement, and the involvement of Kay and not the plaintiff in the Lake County sewer system negotiations. Kay again referred to a settlement in the sexual harassment suit on August 23, 1990, to another newspaper. On August 24, 1990, Kay told a newspaper that as a resident of Lake County, he "would not be happy if Geick were to get the job." He would vote "no, no question, no hesitancy," if he were on the committee.

It was alleged that these remarks violated the separation agreement. The characterizations of plaintiff as un-

trustworthy and references to the Federal lawsuit were alleged to impute traits of disloyalty and general unfitness for employment at a supervisory level. In paragraph 22 it was alleged that defendants "maliciously and intentionally and in utter disregard to their truth or falsity, caused the publication of false statements in violation of the separation agreement." Plaintiff sought punitive damages under count I.

Under count II for libel *per quod* the same allegations of count I were realleged. Plaintiff claimed he was forced to withdraw his application for director because of the violation of the separation agreement. Count III alleged an invasion of privacy by publication of a private fact. Count IV alleged tortious (intentional) interference with prospective economic advantage.

Defendants filed separate motions to dismiss the complaint under sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (Ill. Rev. Stat. 1989, ch. 110, pars. 2-615, 2-619). Under the section 2-615 motion defendants claimed plaintiff failed to state a cause of action under any count. In the section 2-619 motion, defendants raised absolute privilege; fair comment; innocent construction; opinion; and the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (Ill. Rev. Stat. 1989, ch. 85, par. 1-101 *et seq.*). At a hearing the court indicated that it was granting the motions for counts I, II and III, due to a failure to state a cause of action, privilege, and innocent construction. These counts were dismissed with prejudice on June 10, 1991; however, the order does not recite the grounds. Plaintiff was allowed to replead count IV.

Plaintiff filed a first amended complaint wherein he alleged tortious (intentional) interference with prospective

economic advantage (count IV) and breach of contract (count V). Plaintiff sought punitive damages under both counts. Pursuant to defendants' section 2-615 motion, count IV was dismissed with prejudice on September 18, 1991. With respect to count V, all claims for damages, with the exception of nominal damages, were dismissed with prejudice and claims against defendants individually were dismissed with prejudice. Plaintiff was allowed to replead count V.

On November 13, 1991, count V was dismissed pursuant to plaintiff's section 2-1009 motion of the Code. (Ill. Rev. Stat. 1989, ch. 110, par. 2-1009.) A Rule 304(a) finding was entered with respect to the other orders and this appeal followed. 134 Ill. 2d R. 304(a).

Prior to addressing the arguments with respect to counts I, II, and III, we note that the June 10, 1990, order does not specify whether the counts were dismissed under sections 2-615 or 2-619 of the Code. (Ill. Rev. Stat. 1989, ch. 110, pars. 2-615, 2-619.) Both motions are cited in the first paragraph of the order. The oral pronouncements by the court also indicate that dismissal was proper under either motion, and the parties have argued under both sections. Despite this lack of clarity, a reviewing court may affirm a correct decision for any reason appearing in the record regardless of the basis relied upon by the trial court. *Weber v. Cueto* (1991), 209 Ill. App. 3d 936.

In considering a motion to dismiss under section 2-615, all well-pleaded facts in a complaint must be taken as true with all inferences from it to be drawn in favor of the nonmovant. (*Meerbrey v. Marshall Field & Co.* (1990), 139 Ill. 2d 455.) A complaint should not be dismissed for failure to state a cause of action unless it clearly appears that no set of facts could be proved under the allegations

which would entitle the party to relief. (*Meerbrey*, 139 Ill. 2d at 473.) This broad statement, however, should not be construed as an adoption of notice pleading. (*Board of Education v. A, C & S, Inc.* (1989), 131 Ill. 2d 428, 438.) The granting of a motion to dismiss is within the sound discretion of the trial court. *Knox College v. Celotex Corp.* (1981), 88 Ill. 2d 407.

Like a motion brought under section 2-615, a motion to dismiss under section 2-619 admits all well-pleaded facts. (*In re Marriage of Hoppe* (1991), 220 Ill. App. 3d 271.) The purpose of a section 2-619 motion is to provide a mechanism to dispose of issues of law or easily proved issues of fact, and the cause of action should not be dismissed on the pleadings unless it is clearly apparent that no set of facts can be proved which will entitle a plaintiff to recover. (*Brown v. Chicago Park District* (1991), 218 Ill. App. 3d 612, 615.) Under section 2-619(a)(9) of the Code, an action may be dismissed on the ground that a claim asserted is barred by other affirmative matter avoiding the legal effect or defeating the claim. (Ill. Rev. Stat. 1989, ch. 110, par. 2-619(a)(9).) "Affirmative matter" includes something in the nature of a defense that completely negates the alleged cause of action. *Brown*, 218 Ill. App. 3d at 616.

No affidavits were filed in support of defendant's section 2-619 motion. However, where the section 2-619 motion is made on grounds appearing on the face of the pleading attacked, the motion need not be supported by affidavit. (Ill. Rev. Stat. 1989, ch. 110, par. 2-619(a); *Hoppe*, 220 Ill. App. 3d at 284.) Defendants' memorandum in support of their motion included copies of pertinent provisions of the Lake Zurich village code and documents from the sexual harassment lawsuit which also sufficed to support consideration of the motion. (See *Christmas v. Hughes* (1989),

187 Ill. App. 3d 453.) Furthermore, plaintiff did not object below to the lack of affidavits, nor does he raise the matter on appeal. The lack of affidavits is waived. See *Hays v. Louisiana Dock Co.* (1983), 117 Ill. App. 3d 512.

Counts I and II sought recovery under libel *per se* and libel *per quod*. To recover under libel *per se*, the statements that form the basis of the action must falsely charge the plaintiff with misconduct or incapacity in words so obviously and naturally harmful that they are actionable without the proof of special damages. (*Costello v. Capital Cities Communications, Inc.* (1988), 125 Ill. 2d 402.) There are four categories of words that constitute libel *per se*. (*Costello*, 125 Ill. 2d at 414.) Only two of those categories are relevant here: words or statements which impute unfitness or want of integrity in performing the duties of an office and those which impute a lack of ability in a person's business, trade or profession. (*Erickson v. Aetna Life & Casualty Co.* (1984), 127 Ill. App. 3d 753.) Whether the particular language used is defamatory *per se* is a question of law to be determined by the court. See *Costello*, 125 Ill. 2d at 414; *Powers v. Delnor Hospital* (1986), 148 Ill. App. 3d 844.

Defendants point out, and plaintiff concedes, that plaintiff is a public official who must plead and prove actual malice on the part of defendants. (See *Colson v. Stieg* (1982), 89 Ill. 2d 205.) Statements are made with actual malice when they are made with knowledge of their falsity or with reckless disregard of whether the statements were false. (*Reed v. Northwestern Publishing Co.* (1988), 124 Ill. 2d 495.) Although defendants contend that plaintiff failed to allege a cause of action under section 2-615 because plaintiff made only a bare allegation of actual malice, we disagree. Unlike *Suchomel v. Suburban Life Newspapers, Inc.* (1968), 40 Ill. 2d 32, plaintiff pled a factual

allegation of "reckless disregard to their truth or falsity" in making the "false statements." (See *Coursey v. Greater Niles Township Publishing Corp.* (1968), 40 Ill. 2d 257.) Plaintiff also included supporting facts unlike *Matchell v. Chicago Bar Association* (1984), 125 Ill. App. 3d 1004, because plaintiff set forth the particular words alleged to be defamatory (*O'Donnell v. Field Enterprises, Inc.* (1986), 145 Ill. App. 3d 1032), and incorporated by reference the articles in question (*Coursey*, 40 Ill. 2d at 268). Although plaintiff did not make the allegation of actual malice with respect to each statement, he did refer to "false statements" in paragraph No. 22. While he could have clarified which statements he meant to include in this allegation, we find that plaintiff sufficiently pled a cause of action in libel under section 2-615. See *Colson*, 89 Ill. 2d at 215-16; *Costello v. Capital Cities Media, Inc.* (1982), 111 Ill. App. 3d 1009.

Plaintiff argues that the statements were libelous under the innocent construction rule; that they were not opinion; that truth is not a defense due to the separation agreement; and absolute privilege does not apply. We begin our review with absolute privilege as we find it dispositive of the issue.

The issue of privilege is an affirmative defense, and it may be raised by and determined upon a motion to dismiss under section 2-619. (*O'Donnell*, 145 Ill. App. 3d 1032.) An absolutely privileged communication is one in respect of which, by reason of the occasion on which or the matter in reference to which it is made, no remedy can be had in a civil action. (*Weber*, 209 Ill. App. 3d 936.) An absolute privilege cannot be overcome by a showing of improper motivation or knowledge of falsity (*Blair v. Walker* (1976), 64 Ill. 2d 1), *i.e.*, made with malice (*Weber*, 209 Ill. App. 3d at 942.)

Absolute privilege is a defense in a defamation action against government officials. (*Morton v. Hartigan* (1986), 145 Ill. App. 3d 417.) Absolute immunity, or privilege, represents a severe restriction on the right of the individual to be secure in his reputation. (*Blair*, 64 Ill. 2d at 6.) The restriction is justified by the countervailing policy that officials of government should be free to exercise their duties without fear of potential civil liability. (*Blair*, 64 Ill. 2d at 6.) Courts have held that an official of the executive branch of the Federal, State or local governments cannot be held liable for statements made within the scope of his official duties. (*Dolatowski v. Life Printing & Publishing Co.* (1990), 197 Ill. App. 3d 23.) Absolute privilege regarding communications made within the scope of official duties has been extended to mayors of Illinois municipalities or chief administrators. *Springer v. Harwig* (1981), 94 Ill. App. 3d 281; see *Loniello v. Fitzgerald* (1976), 42 Ill. App. 3d 900.

Defendant Kay, as president of the Board was also designated as the mayor. (Lake Zurich, Ill., Village Code, ch. 4, par. 1-4-3(A)(1) (19____); Ill. Rev. Stat. 1989, ch. 24, par. 3-12-2.) As an official of the executive branch of a local government, Kay cannot be held liable for statements made within the scope of his official duties. (*Dolatowski*, 197 Ill. App. 3d at 28.) Plaintiff does not deny that absolute privilege applies to Kay in his capacity as president of the Board/mayor of Lake Zurich, but argues that Kay did not act within the scope of his official duties when making the statements.

First, plaintiff distinguishes *Blair*, *Loniello* and *Springer* on their facts. Plaintiff distinguishes *Blair* (64 Ill. 2d 1) on the ground that Kay's statements were not made to any village agency over which Kay had control relative to any public interest. However, *Blair* involved two press

releases to the public by the governor which related to the actions the governor had directed to be instituted by a State agency against the plaintiffs. It was noted by the court that the governor was frequently required to communicate to his constituency and was acting within his inherent, discretionary authority by informing the public of his actions. Plaintiff also attempts to distinguish *Blair* on the basis of the separation agreement, an argument we address subsequently. Additionally, plaintiff contends that Kay was not addressing a city council meeting as was the case in *Loniello* (42 Ill. App. 3d 900), nor was there a lawsuit pending between plaintiff and defendants at that time to which the statements related as in *Springer* (94 Ill. App. 3d 281). Plaintiff also argues that there was no relationship between plaintiff and Kay because plaintiff was no longer employed by Lake Zurich when the statements were made.

Absolute privilege is not limited to those factual situations set forth in *Blair*, *Loniello* and *Springer*. The only consideration is whether the statements made were reasonably related to Kay's duties. (*Dolatowski*, 197 Ill. App. 3d at 29; *Morton*, 145 Ill. App. 3d 417.) In *Blair* the information in the press release came within the privilege. The newspaper report in *Springer* related to the duties of the mayor. Oral statements in the newspaper interview made by the deputy police superintendent in *Dolatowski* were reasonably related to his duties and thus covered by the privilege. Kay did not have to be addressing a board meeting to invoke the privilege as in *Loniello*, nor did litigation have to be pending between plaintiff and defendants at the time; and the fact plaintiff was no longer employed by the Village (*Morton*) did not defeat the privilege under the facts of this case.

We have examined the various statements alleged to be defamatory by plaintiff. Assuming *arguendo* that these statements were libelous, no liability may attach to defendants because of absolute privilege. As president of the Board, Kay had general supervision over all executive officers and employees of Lake Zurich. He had the power of appointment and removal of officers with the consent of the Board. Kay's statements regarding "trust" as a qualification necessary in an administrator, plaintiff's resignation, and the circumstances relating to plaintiff's resignation such as the sexual harassment lawsuit were reasonably related to Kay's duties. *Dolatowski*, 197 Ill. App. 3d at 29.

The press release explained the actions taken by defendants in settlement of the harassment suit. (See *Blair*, 64 Ill. 2d 1.) While the lawsuit was not between defendants and plaintiff, it did involve Lake Zurich and two former employees of Lake Zurich. Similar to *Springer* (94 Ill. App. 3d at 284), these statements were made within the scope of Kay's duties as Lake Zurich's president. The press release also explained Kay's involvement in the sewer system negotiations as opposed to plaintiff's. It addressed plaintiff's resignation and the question of "politics" in Lake Zurich's decision-making process. Kay was acting within the scope of his duties and was providing full public knowledge of the facts and conduct of Lake Zurich's actions. (See *Blair*, 64 Ill. 2d at 6.) Furthermore, Kay's later statement regarding the suggestion of politics as "offensive" in relation to plaintiff's resignation was reasonably related to his duties as president since it involved the removal of a village officer.

Defendant Kay's statements regarding plaintiff's candidacy for director of the Lake County storm water management committee were also reasonably related to Kay's

duties as chief executive officer of Lake Zurich. Lake Zurich is in Lake County and would be affected by the committee's actions. Plaintiff claims these remarks were not privileged because they were uttered in connection with the other statements alleged in his complaint. However, we have found those other statements absolutely privileged. Plaintiff also points out that when the statement was made, the committee had already approved him. We note from memorandum by plaintiff before the trial court that plaintiff had already withdrawn his application, but Kay was unaware of this fact. In examining the newspaper articles attached as exhibits to plaintiff's complaint, it is apparent that the screening committee for the storm water agency had approved plaintiff. However, full board approval had not been given, and a background check of plaintiff had been approved. We find plaintiff's distinctions of little merit and conclude that the statements were reasonably related to Kay's duties as chief executive officer of Lake Zurich.

Plaintiff claims that the August 24, 1990, statements, as well as the other statements, violate the separation agreement. Plaintiff contends that under *Cohen v. Cowles Media Co.* (1991), 501 U.S. ____, 115 L. Ed. 2d 586, 111 S. Ct. 2513, the defense of absolute privilege is barred because of the separation agreement. He relies on the separation agreement throughout his brief and uses it as the distinguishing feature in this case.

In *Cohen* the plaintiff approached reporters and offered to provide documents relating to a candidate in an upcoming election. Cohen made it clear that he would provide the information only upon a promise of confidentiality. The reporters promised to keep Cohen's identity anonymous and received the documents from him. The editorial staffs of the newspapers decided, however, to publish

Cohen's name as the source. Cohen was fired the same day the stories appeared. The issue before the United States Supreme Court was whether the first amendment barred a promissory estoppel action against the newspapers.

The Court noted that generally applicable laws do not offend the first amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. Promissory estoppel was a law of general applicability. It did not target or single out the press. The first amendment did not forbid its application to the press. Therefore, Cohen could seek damages against the press based on promissory estoppel. The first amendment did not confer on the press a constitutional right to disregard promises otherwise enforceable under State law. It was noted by the Court that Cohen was not attempting to use promissory estoppel to avoid the strict requirements for a libel or defamation claim. Cohen was not seeking damages for injury to his reputation or state of mind, but for breach of a promise.

After carefully examining *Cohen*, we find it is not analogous to this situation and does not bar absolute privilege as a defense to the tort claims herein. *Cohen* allowed a cause of action under promissory estoppel to proceed against the press where the press breached a promise. *Cohen* did not permit the tort action of defamation to be pursued on the basis of promissory estoppel. *Cohen* certainly has nothing to do with absolute privilege as a defense in a *libel* action, but merely holds that the first amendment does not prevent a promissory estoppel action against the press. We also point out to plaintiff that the court herein did not dismiss his breach of contract count against defendants in their official capacity. The breach of contract count may have been somewhat analogous to the *Cohen*

situation; however, plaintiff has not raised an issue with respect to that count, and it is not before us. *Cohen* does not bar the defense of absolute immunity in this case. Since Kay's statements were absolutely privileged, no cause of action in defamation can be maintained against him, as president or individually, or against the Board despite the existence of the separation agreement.

Since we have determined that absolute privilege was a proper basis upon which to dismiss with prejudice the libel *per se* and libel *per quod* counts, we need not address the other defenses or arguments relating to these counts. Count III alleged the tort of invasion of a right of privacy by publication of a private fact, and count IV alleged intentional or tortious interference with prospective economic advantage. Count III was dismissed in the June 10, 1991, order where the basis of dismissal, section 2-615 or section 2-619, is not specified. Count IV was dismissed under defendants' section 2-615 motion. However, that motion included absolute privilege as grounds for dismissal which is affirmative matter for a section 2-619 motion. (*O'Donnell*, 145 Ill. App. 3d at 1041.) These types of hybrid procedures which combine separate motions for joint analysis and determination have been expressly disapproved and are discouraged. (*Smith v. Chemical Personnel Search, Inc.* (1991), 215 Ill. App. 3d 1078.) However, in the interests of judicial economy and since plaintiff was not prejudiced by the improper combination as he responded to the privilege issue in his memorandum before the trial court and on appeal, we consider the matter on the merits. *Smith*, 215 Ill. App. 3d at 1081.

Absolute immunity has been applied to virtually every common-law tort, including, but not limited to, malicious prosecution, tortious interference with business, false arrest, blackmail, fraud, intimidation, and invasion of privacy

claims. (*Morton*, 145 Ill. App. 3d at 426-27.) Assuming *arguendo* that counts III and IV alleged causes of actions, they are barred by the absolute privilege doctrine which we have found applies to defendants. These counts were properly dismissed with prejudice.

In the last issue, plaintiff contends that the Tort Immunity Act (Ill. Rev. Stat. 1989, ch. 85, pars. 1-101 *et seq.*) does not bar the causes of actions alleged in counts I, II, III and IV because Kay acted beyond the scope of his authority. He also argues that punitive damages are not barred under the Act because of the same reasoning. Since we have determined that Kay was acting within the scope of his duties and that all four causes of action against defendants are barred based upon absolute privilege, we need not address this remaining issue.

In passing, we note that plaintiff, as appellant, has raised no issue or argument with respect to the involuntary dismissal with prejudice of that part of the breach of contract count against Kay in his individual capacity. Plaintiff voluntarily dismissed the breach of contract count against defendants in their official capacity. Defendants, however, briefly defend the involuntary dismissal on the ground that Kay, as an individual, was not a party to the separation agreement and cannot be sued in his individual capacity for its breach, citing *Wottowa Insurance Agency, Inc. v. Bock* (1984), 104 Ill. 2d 311. Since plaintiff has not raised an issue with respect to the involuntary dismissal of the breach of contract count, we do not address defendants' contentions.

Based on the foregoing reasoning, the judgment of the circuit court is affirmed.

Affirmed.

BOWMAN and DOYLE, JJ., concur.

APPENDIX B

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

February 3, 1993

Mr. Stanley H. Jakala
Attorney at Law
3219 S. Maple Ave.
Berwyn, IL 60402

No. 74722—Edward A. Geick, petitioner, v. James W. Kay, Indv., etc., et al., respondents. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Nickels, J., took no part.

The mandate of this Court will issue to the Appellate Court on February 25, 1993.

APPENDIX C

State of Illinois
County of Lake—ss

Filed June 10, 1991

IN THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
LAKE COUNTY, ILLINOIS

Geick
Plaintiff,

vs.

Gen. No. 90 L 1707

Kay, et al.
Defendants.

ORDER

THIS MATTER COMES BEFORE THE COURT on defendants' motions pursuant to Sections 2-615 and 2-619 to dismiss and strike all four counts of plaintiff's complaint, the parties having briefed and argued the motions, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED:

1. Counts I, II, and III of plaintiff's complaint alleging libel per se, libel per quod, and invasion of privacy are dismissed with prejudice.

2. Count IV of plaintiff's complaint alleging intentional interference with prospective economic advantage is dismissed without prejudice. Plaintiff has 21 days from June

10 to replead Count IV. Defendants have 21 days thereafter to respond to any such repleading.

3. Plaintiff is given leave to plead any alleged breach of contract claim within the same 21-day period. Defendants have 21 days thereafter to respond to any such breach of contract claim.

ENTER: /s/ WILLIAM D. BLOCK
Judge

State of Illinois
County of Lake—ss

Filed September 18, 1991

IN THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
LAKE COUNTY, ILLINOIS

Geick

Plaintiff,

vs.

Gen. No. 90 L 1707

Kay, et al.

Defendants.

ORDER

THIS CAUSE is before the Court on defendants' motion to dismiss plaintiff's first amended complaint;

IT IS HEREBY ORDERED:

Defendants' motion to dismiss is granted as to Count IV and Count IV is hereby dismissed with prejudice.

Defendants' motion to dismiss is granted as to Count V as follows:

1. All claims for punitive damages are hereby dismissed with prejudice.

2. Plaintiff's claims for damages are hereby dismissed with prejudice; as a matter of law plaintiff is entitled only to nominal damages.

3. All claims against defendants in an individual capacity are hereby dismissed with prejudice.

Defendants have 21 days within which to answer or otherwise plead as to the remaining allegations of Count V.

This matter is set for status on October 24, 1991, at 9:00 a.m.

ENTER: /s/ WILLIAM D. BLOCK
Judge

APPENDIX D

SEPARATION AGREEMENT

This Agreement is entered into this Thirty First (31st) day of January 1990 by and between EDWARD A. GEICK (hereinafter referred to as "GEICK") and the Village President and Board of Trustees constituting the Corporate Authorities of the VILLAGE OF LAKE ZURICH, LAKE COUNTY, ILLINOIS (hereinafter referred to as "THE VILLAGE").

WHEREAS Geick is presently serving in the position of Village Administrator having been duly appointed by the Village President and Board of Trustees of the Village pursuant to local ordinance; and

WHEREAS certain differences have arisen between Geick and the Village affecting Geick's continued appointment to the position of Village Administrator; and

WHEREAS both Geick and the Village are of the opinion that it is in their respective best interests that Geick resign from and no longer serve in the position of Village Administrator; and

WHEREAS Geick and the Village have conferred as to the terms and conditions of Geick's separation from his position with the Village, which terms and conditions are set forth as follows:

1. Geick will resign from his position as Village Administrator effective as of the end of the business day of January 31, 1990.

2. Effective that date, the Village agrees to pay Geick his present rate of salary, and provide continued group

medical coverage for him and his family for a period of six (6) months therefrom, subject to the same withholding and deductions which were made prior to his resignation. It is understood and agreed that should Geick receive the same or similar medical coverage from a subsequent employer at any time within the aforementioned six (6) month period of time, the Village shall no longer be required to provide such coverage to Geick and members of his family. Notwithstanding the foregoing, nothing contained herein shall in any way rescind or void the Village's agreement to pay Geick's salary during said six (6) month period.

3. Within Thirty (30) days hereof, the Village shall pay Geick in one lump sum for any and all earned and accrued vacation time due and owing as of the date of his resignation.

4. Neither Geick nor the Village shall make any statements or comments to members of the public or the media, including any newspapers, regarding Geick's resignation from his position as Village Administrator; Geick's alleged involvement in Case No. 89 C 7911 presently pending in the United States District Court for the Northern District of Illinois; or Geick's previous employment as the Village Administrator of Theinsville, Wisconsin.

5. Geick and the Village agree that they will issue a joint press release to the media and the public stating only that the Village has asked that Geick resign from his position as Village Administrator and, pursuant thereto, Geick has honored that request and tendered his resignation which has been accepted by the Village. Geick and the Village agree that if any further information is requested, the inquiring party shall be told that the details of Geick's resignation are a personnel matter and not subject to public comment or disclosure by either party.

6. The Village agrees that neither the Village President nor any member of the Board of Trustees shall give a reference that is negative to or critical of Geick's tenure as Village Administrator to any municipality, public entity or prospective employer that inquires into Geick's position as Village Administrator. The Village further agrees that if asked by a prospective employer for a reference, the inquiring party shall be told that it is the policy of this Village Board with regard to this position, to make no reference or recommendation, either negative or positive, and that the party should feel free to contact the former Village President should they care to make any further inquiry.

7. The Village agrees that subsequent to his resignation, it will continue to defend, save harmless, and indemnify Geick in Case No. 89 C 7911 presently pending in the United States District Court for the Northern District of Illinois. Geick agrees to continue to cooperate with, and assist in, the defense of that case and make himself available in the future, if needed. The Village shall reimburse Geick for any out of pocket expenses incurred by him in assisting in the defense of this suit subsequent to his resignation. In addition, to the extent allowed by applicable State Statute, or Lake Zurich Ordinance only, the Village shall defend, save harmless and indemnify Geick for any and all other claims, suits or proceedings, whether groundless or otherwise, arising out of any alleged act or omission that occurred during the performance of Geick's duties as Village Administrator.

8. Geick shall be permitted to review the contents of his personnel file and he shall be allowed to remove therefrom any notes, drafts or documents of any kind which are negative or critical of Geick in his capacity as the Village Administrator, or in any way reflect or refer to

any of the facts and circumstances surrounding his resignation. The Village agrees that three original Separation Agreements shall be executed by the parties. One original shall be placed in Geick's personnel file in a sealed envelope with a prominent notation on the envelope that the contents are confidential and not subject to disclosure under either the Illinois or the Federal Freedom of Information Act without the express written consent of Geick. The second original Separation Agreement shall be kept by Geick. The parties agree that the third original Separation Agreement shall be kept in the possession of the Village Attorney, Dennis Ryan. No other copies shall be maintained.

9. Simultaneous with the execution of this Separation Agreement, the Village shall provide Geick with a letter on Village letterhead stating that Trustee Karen Demos was misquoted in the January 25, 1990 issue of the "News Graphic Pilot" newspaper, and that the Village regrets any embarrassment or inconvenience this may have caused Geick. Geick agrees that he will not reveal the aforementioned letter to any other persons or parties except in response to inquiries or references made to said January 25, 1990 newspaper article.

10. Geick does hereby release, acquit and discharge the Village of Lake Zurich, its Village President and members of the Board of Trustees, employees, agents, and attorneys, of and from all manner of claims, demands, causes of action or damages arising from his appointment and tenure as the Village Administrator of the Village of Lake Zurich which he now has, or may have against the Village, its President or members of the Board of Trustees.

The Village, its Village President and members of the Board of Trustees do likewise hereby release, acquit and

discharge Geick of and from all manner of claims, demands, causes of action or damages arising from his appointment and tenure as the Village Administrator of the Village of Lake Zurich which either the Village or the Village President or the members of the Board of Trustees now have, or may have against Geick.

This Agreement constitutes the full and complete agreement reached between the parties, and nothing contained herein shall be amended, modified or changed without the express written consent of Geick and the Corporate Authorities of the Village.

IN WITNESS WHEREOF, the Village has caused this Separation Agreement to be signed and executed on its behalf by its President and duly attested by its Clerk, and Edward Geick has signed and executed this Separation Agreement both in triplicate, the day and year first above written.

/s/ JAMES W. KAY
President

/s/ EDWARD A. GEICK

ATTEST:

/s/ MARY HORNLUEKLE
Deputy Village Clerk

APPROVED AS TO FORM:

/s/ MARK E. BURKLAND
for DENNIS RYAN
Village Attorney